

Gordon v Rolando

2008 NY Slip Op 31431(U)

May 9, 2008

Supreme Court, Nassau County

Docket Number: 6199-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
DUSHAWN GORDON AND JOSEPH PHILLIPE,

TRIAL TERM PART: 48

Plaintiffs,

-against-

INDEX NO.: 6199/07

**MOTION DATE: 3-27-08
SUBMIT DATE: 5-7-08
SEQ. NUMBER - 001 &
002**

JOSE ROLANDO AND JOSE LOPEZ,

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 2-25-08.....1**
- Affirmation in Opposition, dated 4-23-08.....2**
- Notice of Cross Motion, dated 3-13-08.....3**

The motions by the plaintiff/defendant on the counterclaim, Gordon (plaintiff) and co-plaintiff Phillipe, for summary judgment pursuant to CPLR 3212 on the issue of liability is granted. Summary judgment is granted to plaintiff's and the counterclaims of defendant's and all cross claims relating to liability are dismissed.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v*

Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief, *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion.

Mgrditchian v. Donato, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*,

196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

The movants' submission in support of the motion established entitlement to summary judgment thus shifting the burden to the defendant to rebut the their case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, the defendant has failed to offer any testimony to establish the existence of triable issues of fact the motion is granted on the issue of liability and all cross claims, affirmative defenses and counterclaims as to liability are dismissed.

Based upon this record, the Court finds no material fact issues requiring a trial with respect to the parties' involvement in the cause of the accident. There are no triable issues of fact regarding the actions of plaintiff or of defendant. Plaintiff has submitted copies of the pleadings, the deposition testimony of both plaintiff and defendant. Plaintiff states that he was operating his vehicle on Uniondale Road and shortly after moving on a green signal to cross over Nassau Road, was struck by defendant's vehicle. Neither party disputes that there was a red traffic light signal controlling defendant's traffic movement and that the plaintiff's was green.

Defendant testified at his Examination Before Trial that upon approaching the intersection he did not see either the traffic signal or plaintiff's vehicle before proceeding into the intersection.

In response to the motion, counsel for defendant argues in a conclusory fashion that plaintiff has not proved negligence as a matter of law and relies on *Nuziale v. Paper Transport of Green Bay Inc.*, 39 AD3d 833 (2d Dept. 2007) and *Munter v. Hubert*, 34 AD3d 544 (2d Dept. 2006). However, here, unlike in those cases, there is no discrepancy in the accident accounts and plaintiff testified that he did look both left and right on Nassau Road before proceeding. Moreover as the driver of the vehicle with the right of way, plaintiff is entitled to anticipate that the defendant would obey the traffic laws which required him to stop. *Berner v. Koegel*, 31 AD3d 591(2d Dept. 2006).

Plaintiff has established a *prima facie* entitlement to judgment as a matter of law. (See, Vehicle and Traffic Law § 1111[d], *Casanova v. New York City Transit*, 279 AD2d 495 (2d Dept. 2001). The evidence offered by plaintiff together with defendant's admission that he entered the intersection in which the accident occurred without looking at the light creates a *prima facie* case that he was solely liable for the accident. *Diasparra v. Smith*, 253 AD2d 840 (2nd Dept. 1998). Viewing the evidence in the light most favorable to defendant and according him every reasonable inference, the Court finds that a jury could not find comparative negligence on the part of plaintiff and the defendant's evidence in opposition to the motion is insufficient to raise a triable issue of fact. *Rumanov v. Greenblatt*, 251 ADd2d 566, (2nd Dept. 1998).

Moreover, such negligence on the part of defendant was the sole proximate cause of the accident. Consequently it is clear as there is no conflicting testimony and defendant fails to raise any material factual issues as to the plaintiff's culpability, as a matter of law, defendant was solely at fault for this occurrence. *Snow v. Howe*, 253 AD2d 870 (2nd Dept.

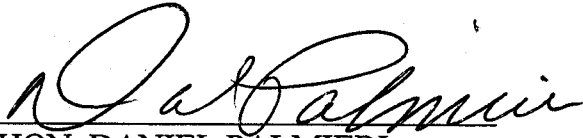
1998).

Having found no material issues of fact, plaintiffs' motion for summary judgment on the issue of liability against defendant are granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 9, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
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COUNTY CLERK'S OFFICE